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(I)



# In the Supreme Court of the United States

OCTOBER TERM, 1941

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No. 1109

EDWARD MONTGOMERY, PETITIONER

v.

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT*

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the circuit court of appeals (R. 30-36; 55-59) is reported in 126 F. (2d) 151.

## JURISDICTION

The judgment of the circuit court of appeals was entered January 6, 1942 (R. 37). An order denying a petition for rehearing was entered on March 6, 1942 (R. 60). The petition for a writ of certiorari was filed on April 4, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

**QUESTION PRESENTED**

Whether the trial court improperly refused to permit cross-examination of a Government witness as to a prior conviction for desertion, a misdemeanor.

**STATEMENT**

Upon an indictment in six counts petitioner was convicted upon the first and second counts (R. 10), charging, respectively, violations of 26 U. S. C. 1184 and 1162 (Internal Revenue Code, secs. 2833 and 2810), relating to distilling without giving bond and the registering of stills (Pet. 6). He was sentenced to 18 months' imprisonment and a fine of \$500 on count 1 and 18 months' imprisonment, a fine of \$100 and a penalty of \$500 on count 2, the terms of imprisonment to run concurrently (R. 11). Upon appeal the judgment of conviction was affirmed (R. 37, 59).

The question involved herein arose under the following circumstances: During the cross-examination of a rebuttal witness for the Government, the trial court sustained the objection of the United States Attorney to the question, asked to impeach the witness' credibility, whether he had been "convicted and an order" made against him by the Domestic Relations Court of Philadelphia (R. 27).<sup>1</sup>

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<sup>1</sup> No exception was taken by petitioner and the incident was not brought into the record by bill of exceptions (see R. 26-27) under Rule IX of the Criminal Appeals Rules. The question was, however, considered by the Circuit Court of Appeals and we therefore discuss it.

The record does not disclose for what crime the witness was allegedly convicted (see R. 13), but petitioner states that he was attempting to question the witness concerning his conviction for the desertion of his wife and children, a misdemeanor (Pet. 5).

#### ARGUMENT

The holding of the circuit court of appeals that the witness' credibility could not be impeached by showing a prior conviction for desertion, a misdemeanor not *crimen falsi* (R. 58), is plainly correct and does not present any conflict of decisions warranting certiorari.

In *Wolfe v. United States*, 291 U. S. 7, 12, this Court stated that, in the absence of congressional legislation,<sup>2</sup> the admissibility of evidence in a criminal proceeding is "governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience. *Funk v. United States*, 290 U. S. 371."

As the court below held (R. 58) "the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, [is] that it is only convictions for felony or misdemeanors amounting to *crimen falsi* which are admissible to impeach a witness' credibility."<sup>3</sup> Cf.

<sup>2</sup> There is no congressional legislation relating to the question.

<sup>3</sup> *Tla-Koo-Yel-Lee v. United States*, 167 U. S. 274, relied upon by petitioner as supporting a contrary rule (Pet. 25), held only that it was improper not to allow the defendant to show, by cross-examination, that the witness was biased

*Melaragno v. United States*, 88 F. (2d) 264, 265 (C. C. A. 3); *Verro v. United States*, 95 F. (2d) 504 (C. C. A. 3); *Bartos v. United States District Court*, 19 F. (2d) 722, 724 (C. C. A. 8).<sup>4</sup> In *Funk v. United States*, 290 U. S. 371, 381, this Court stated that "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." We submit that a prior conviction for desertion<sup>5</sup> bears no relationship to a witness' veracity and in no sense warrants the impeachment of his credibility on that ground.

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against him and her former husband, whom she implicated in the crime, by reason of her illicit relations with another witness for the prosecution. No question as to the right of the defendant to impeach the witness' veracity on the ground of a prior conviction for adultery, a felony (Carter's Ann. Alaska Codes (1900) Part I, sec. 121), was involved.

<sup>4</sup> See also *Middleton v. United States*, 49 F. (2d) 538, 540 (C. C. A. 8); *Pittman v. United States*, 42 F. (2d) 793, 795 (C. C. A. 8); *Scaffidi v. United States*, 37 F. (2d) 203, 211 (C. C. A. 1); *Fay v. United States*, 22 F. (2d) 740-741 (C. C. A. 9); *Lawrence v. United States*, 18 F. (2d) 407, 408 (C. C. A. 8); *Haussemer v. United States*, 4 F. (2d) 884, 887 (C. C. A. 8); *Neal v. United States*, 1 F. (2d) 637, 639 (C. C. A. 8); *Solomon v. United States*, 297 Fed. 82, 92 (C. C. A. 1). The cases from each of the circuit are collected in III Wigmore, *Evidence* (3d ed. 1940), sec. 987, pp. 574-575. See also *Thomas v. Devine*, 104 N. J. L. 361, 364; *State v. Block*, 119 N. J. L. 277, 282.

<sup>5</sup> As is pointed out in Wharton, *Criminal Law* (12th ed. 1932), section 1850, the primary purpose of laws relating to desertion is to secure the support of the family and prevent it from becoming a public charge. *Commonwealth v. Shankel*, 19 Atl. (2d) 493, 494 (Pa.); *Commonwealth v. Leonard*, 93 Pa. Super. 21.

## CONCLUSION

The case was correctly decided below, and there is involved no conflict of decisions or any important question of federal law. We therefore respectfully submit that the petition for a writ of certiorari be denied.

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APRIL 1942.